

misrepresentations.^{55/} As a further safeguard, the Commission conditioned the stay on MobileMedia's assurance that no MobileMedia stock, which had already declined drastically in value and had been delisted from the NASDAQ National Market, owned by its directors and officers would be transferred or sold during the pendency of the stay.^{56/} The Commission concluded that "it appears that any benefit to potential wrongdoers, including those that have not been specifically identified, would at most be 'minor'."^{57/} Even assuming some of those potential wrongdoers were, in fact, culpable, there is nothing inherent in the Second Thursday procedure that requires the Commission to punish such individuals — at least those who hold MobileMedia stock — beyond the punishment inherent in the process itself. And there is certainly nothing in the Second Thursday process which compels the Commission to punish innocent licensees and their innocent stockholders. If the Commission believes further investigation or deterrence is necessary, it can pursue applications or licenses of the potential wrongdoer, or other remedies, including show cause or cease and desist proceedings, fines, or divestiture of interests.

29. A paradigm for analysis of this case should be the Commission's disposition in Pinelands, a complex tender offer case, whose salient facts are closely on point. In Pinelands, in the course of reviewing a television transfer application, the Commission discovered that Mario Gabelli, an attributable but non-controlling indirect owner of both the transferor and transferee, had committed widespread violations of the Commission's multiple ownership rules, which had not been initially reported in the transfer application. The Commission considered the alleged violations by

^{55/} Id.

^{56/} Id. at ¶16.

^{57/} Id.

Gabelli to be so “egregious []” that they “demand[ed] a forum separate from the one here.”^{58/} Accordingly, the Commission initiated a show cause hearing “to determine whether he should be ordered to cease and desist from his apparent statutory and rule violations.”^{59/} Though the television license renewal was still subject to appeal, the Commission had just granted that renewal. In response to a renewal challenger’s request for deferral of processing of the transfer application, pending resolution of the Gabelli and other matters, the Commission held, in language that has particular resonance for Western, as follows:

[D]eferral of our action on the transfer application would place an unnecessary limitation on the transferability of the license and would unfairly injure Pinelands [sic] shareholders to the degree that they will be unable to proceed with or enjoy the benefits of the tender offer. [Citation omitted] Thus we find that the public interest would not be served by placing an indefinite hold on the transfer application of Pinelands, a licensee whose renewal application we unconditionally granted.^{60/}

30. In response to the renewal challenger’s attempt to blame the transferor and transferee for the failure to disclose the Gabelli infractions initially, the Commission found that the parties to the transaction had diligently attempted to obtain the information from Gabelli and could not be faulted for his actions, over which they had no control.^{61/} More importantly, the Commission rejected the challenger’s attempt to attribute Gabelli’s alleged wrongdoing to the transferee based on the claim that he had a high degree of influence with the transferee. Citing News International PLC, 97 FCC 2d 349, 356 (1984), the Commission observed “that ‘influence’ is not tantamount to

^{58/} Pinelands, 7 FCC Rcd at 6067.

^{59/} Id.

^{60/} Id. at 6063.

^{61/} Id. at 6065.

control."^{62/} Finally, the Commission held that the challenger's allegations did not meet the threshold requirements of Section 309(d) of the Act, 47 U.S.C. §309(d), and did not raise a substantial and material question of fact tying Gabelli's misconduct to the qualifications of the licensee.^{63/}

31. As in the Pinelands case, the attributable interest holders from the Wireless Bureau's list do not exercise control over Western and are not involved in the day-to-day operations of Western or its subsidiaries. They do not possess voting control and comprise only one third of Western's Board. They are not officers or senior managers of Western, nor are they officers, senior managers or directors of any licensee subsidiary. Finally, they have no involvement anywhere in the Western corporate structure with the kind of conduct at issue in the MobileMedia proceeding, *i.e.*, they do not prepare or supervise the filing of Western's applications or reports to the Commission. In the words of former Commissioner Erwin Duggan's Concurring Statement, "one non-controlling investor should not be able to freeze the sale of WWOR-TV while his own cease and desist proceeding takes place."^{64/} Though it is true that the Second Thursday procedures have stayed the corresponding investigation here, the Pinelands case stands for the proposition that the Commission has the requisite tools to focus its investigations directly on potential wrongdoers and apply a range of sanctions without injuring innocent and otherwise qualified licensees and their shareholders.

V. THE COMMISSION SHOULD MODIFY PARAGRAPH 18 OR CLARIFY THAT IT DOES NOT APPLY TO WESTERN

32. Based on the foregoing analysis, the Commission should modify or clarify paragraph 18 as it pertains to Western. Western suggests a bright line test for corporate licensees such as itself

^{62/} Id. at 6067 n.37.

^{63/} Id. at 6065, ¶¶24-25, n.30.

^{64/} Id. at 6068.

affected by the freeze. Drawing on traditional Commission concepts of control, a showing that attributable interest holder(s) on the Bureau's list do not individually or collectively vote 50% or more of the licensee's stock, comprise 50% or more of the licensee's Board of Directors,^{65/} and are not involved in the day-to-day operations of the licensee should warrant grant of that licensee's applications free of conditions. The Commission could clarify paragraph 18 in this manner, or it could substitute the word "controlling" for "attributable" in paragraph 18. Affected parties could then work with the Bureau within the framework of paragraph 18 for specific recommendations to resume processing.

33. Furthermore, if the Commission requires that additional steps be taken, Hellman & Friedman and Messrs. Bunce and Cohen, out of an abundance of caution and given the extreme urgency of the situation created by the freeze and the draconian effects on Western's business of the freeze, have represented to Western that they would take certain additional steps conditioned on grant of this petition. These additional measures would be implemented solely to eliminate any conceivable argument concerning control — they would not constitute any admission of wrongdoing whatsoever. The steps are as follows:

- (1) Pending favorable resolution of their qualifications in a separate context, Messrs. Bunce and Cohen would resign from Western's Board, and Hellman & Friedman would reduce its representation on Western's Board to one seat, naming an individual not on the Bureau's list as its sole Director.
- (2) Hellman & Friedman would, pending favorable resolution of its FCC qualifications in another context, grant to John Stanton, who is Western's Chairman and Chief Executive Officer, a proxy to vote approximately 17% of its voting stock, giving Mr. Stanton the largest number of votes in Western.


Such steps would be radical measures, particularly given the considerations set forth in footnote 12

^{65/} Such a test is consistent with the Commission's traditional concept of control as applied to wireless licensees. McCaw Cellular Communications, Inc., 4 FCC Rcd 3784, 3788 (Com. Car. Bur. 1989).

above, and given conventional Commission definitions of control. These steps should be unnecessary. Nevertheless, this offer is made to the extent it will assist Western and the Commission in promptly dislodging applications vital to the company's survival and growth, which will enable the company to provide new and improved services demonstrably in the public interest.

Respectfully submitted,

WESTERN WIRELESS CORPORATION

By: _____

Louis Gurman
Kimberly D. Wheeler

Gurman, Blask & Freedman, Chartered
1400 Sixteenth Street, N.W., Suite 500
Washington, D.C. 20036
(202) 328-8200

Dated: July 3, 1997

Its Attorneys

DECLARATION

1. Gene A. DeJordy, declare the following under penalty of perjury that:

1. I am the Director of Regulatory Affairs of Western Wireless Corporation and I am familiar with the facts in the foregoing "Emergency Petition for Limited Reconsideration or Clarification;"
2. All such facts, except those of which official notice may be taken, are true and correct to the best of my knowledge, information and belief, and are proffered in good faith.

July 3, 1997

Date



Gene A. DeJordy

CERTIFICATE OF SERVICE

I, Jamie C. Whitney, a secretary in the law offices of Gurman, Blask & Freedman, Chartered, do hereby certify that I have on this 3rd day of July, 1997, had copies of the foregoing "EMERGENCY PETITION FOR LIMITED RECONSIDERATION OR CLARIFICATION" hand delivered, to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Jackie Chorney, Esquire
Office of Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Rudolfo M. Baca, Esquire
Office of Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

David R. Siddall, Esquire
Office of Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Suzanne Toller, Esquire
Office of Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

David H. Solomon, Deputy General Counsel
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

David Senzel, Esquire
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 610
Washington, D.C. 20554

Daniel Phythyon, Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Rosalind K. Allen, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

David Furth, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2100 M Street, N.W., 7th Floor
Washington, D.C. 20554

Howard C. Davenport, Chief
Enforcement Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8308
Washington, D.C. 20554

Gary Schonman, Chief
Compliance and Litigation Branch
Enforcement Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8308
Washington, D.C. 20554

Myron C. Peck, Deputy Chief
Enforcement Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8308
Washington, D.C. 20554

Anthony D. Mustando
Enforcement Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, D.C. 20554

Robert L. Pettit, Esquire
Nathaniel F. Emmons, Esquire
Nancy J. Victory, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for MobileMedia Corporation

Alan Y. Naftalin, Esquire
Arthur B. Goodkind, Esquire
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W., Suite 1000
Washington, D.C. 20036
Special Counsel to MobileMedia Corporation

David G. Frolio, Esquire
BellSouth Corporation
1133 21st Street, N.W., Suite 900
Washington, D.C. 20036
Counsel for BellSouth Corporation

W. Neil Eggleston, Esquire
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Various Current Employees of MobileMedia Corporation

Dennis P. Corbett, Esquire
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
Counsel for Hellman & Friedman Capital Partners II, L.P. and Certain Affiliates

John H. Harwood, Esquire
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
Counsel for Chase Manhattan Bank, as Agent for the Secured Creditors

Phillip L. Spector, Esquire
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, N.W., Suite 1300
Washington, D.C. 20036-5694
Counsel for Unsecured Creditors

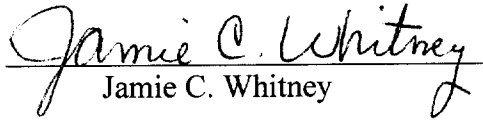
Michael Hays, Esquire
Thomas J. Hutton, Esquire
Dow, Lohnes & Albertson, P.L.L.C.
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D.C. 20036-6802
Counsel for David Bayer

Gerald Stevens-Kittner, Esquire
Linda Shea Gieseler, Esquire
Donna A. Balaguer, Esquire
Mary Nordberg O'Connor, Esquire
2101 Wilson Boulevard, Suite 100
Arlington, Virginia 22201

Counsel for CAI Wireless Systems, Inc., Atlantic Microsystems, Inc. and CS
Wireless Systems, Inc.

Nicholas W. Allard, Esquire
John G. Holland, Esquire
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004

Counsel for Amarillo CellTelCo


Jamie C. Whitney